4. Whether the District Court validly exercised its discretion in enforcing its Calendar Rules and precluding testimony of surprise witnesses where the witnesses were not previously specified in the pre-trial order, not identified until the day before trial, and their testimony was conceded by petitioner to be cumulative.

The Court below answered each of these questions in the affirmative *.

Statement

This action, commenced November 12, 1964, sought damages in the amount of $550,000 from Kress for an alleged violation of the Civil Rights Act of 1871, 42 U. S. C. §1983.

Briefly stated, the original complaint alleged, as a first cause of action, that on August 14, 1964, petitioner, a white person, accompanied six Negro students to the public library in Hattiesburg, Mississippi, where a request by the students to use the library facilities was refused and they were asked to leave. Petitioner and the students thereafter entered the local Kress store, where a waitress employed by Kress refused to take her order while taking those of the Negro students.

The original complaint further charged, as a second claim, that after petitioner left the Kress store, she was arrested and jailed by officers of the Hattiesburg police department for vagrancy, pursuant to an alleged conspiracy between Kress and the Chief of Police of Hattiesburg.

---

* Since Judge Waterman's dissent (Appendix C) related only to question three, the Court was unanimous in affirming the District Court on all the other questions presented.

ARGUMENT

I

Summary Judgment Was Correctly Granted Where There Was No Proof of Conspiracy

Petitioner's allegations concerning the conspiracy charged in the complaint are, patently, constructed of purest gossamer. It would needlessly burden this Court to recite all the proof assembled by respondent, which was wholly uncontroverted by petitioner, and which demonstrated that petitioner did not have a single shred of evidence to support her claim of conspiracy. The facts, as found by the Courts below, and by the Fifth Circuit in *Achtenberg* v. *Mississippi*, 393 F. 2d 468 (5th Cir. 1968), all buttress the inescapable conclusion that Kress was not a party to any conspiracy and, in fact, no conspiracy even existed. Since petitioner did not offer a scintilla of proof to support her claim, respondent was clearly entitled to summary judgment on this issue. *Scolnick* v. *Lefkowitz*, 329 F. 2d 716 (2d Cir.), *cert. denied*, 379 U. S. 825 (1964).

Stringing together three unrelated events, the occurrence at the library, the refusal of service and her arrest, petitioner has persisted in her futile attempt to concoct a conspiracy. The District Court rejected petitioner's flimsy conjecture and the Court of Appeals unanimously affirmed this ruling.

The allegation that Kress was connected with the events at the library is probably petitioner's most far fetched charge. To claim, in view of the record, that the events at the library were connected with any "conspiracy" is preposterous. Kress' store manager was examined by petitioner's counsel and emphatically testified that he did not even know Miss Adickes prior to the time she entered the Kress store and certainly did not know of the events at the library (R. 757, 758 *). In addition,

* References to the record are designated "R."

Miss Adickes admitted that as far as she knew no one at Kress was aware of what had happened at the library (R. 735). More importantly, after full discovery, Miss Adickes was still unable to connect Kress with the library and admitted she had absolutely no evidence of a conspiracy.* The only possible conclusion therefore is that Kress was totally unaware of the happenings at the library, did not discuss the events with anyone at the library or with the police and was not a party to a "conspiracy."

Petitioner further claimed that she was arrested pursuant to this illusory conspiracy, but here too, she failed to produce any evidence to support the allegations. Kress' store manager swore that he had never discussed Miss Adickes or her arrest with the Chief of Police (R. 757-758), and petitioner admitted that she had no knowledge of any facts supporting the claim that Kress conspired with the police:

> "Q. Do you have any knowledge of any communication between Kress, or its officers, directors or employees, with any member of the Hattiesburg Police Department or any officer of the police department? A. No.
>
> * * *
>
> "Q. Did any officer, director or employee of Kress make any statement to you or anyone else

---

* "Q. Miss Adickes, do you have any knowledge of any communication between Kress or any of its officers or directors or employees with anyone connected in any way with the Hattiesburg public library? A. No, I have no knowledge, no direct knowledge.

Q. No what? A. No direct knowledge.

Q. Do you have any knowledge? A. No.

Q. During the entire course of time that you were in or about the Hattiesburg Public Library did anyone say anything about or mention the names of Kress or any of its officers or employees? A. No." (R. 734-735)

to your knowledge which in any way mentioned the Hattiesburg Public Library or the Hattiesburg Police Department? A. No.

• • •

"Q. Did any member of the Hattiesburg Police Department or any other public official of Hattiesburg make any statement to you or anyone else, to your knowledge, which in any way related to Kress or any of its officers, directors or employees? A. No." (R. 735)

In sum, petitioner conceded a total absence of any proof of conspiracy between Kress and the police. Indeed, not only did petitioner admit that she had no evidence, but her own testimony negated any possible trace of an inference. Thus, petitioner testified that upon leaving the library and while going to Woolworth's, before she even decided to go to Kress, she and her companions were being followed and watched by the police (R. 728-729).

Furthermore, the affidavits of the police officers who arrested petitioner made it clear that the arrest of petitioner was not pursuant to any conspiracy with Kress, but rather was due to the independent action of the officers (R. 762-764). Indeed, petitioner made no attempt to rebut these affidavits, nor does she claim that there were any additional available facts.* *Cf. Robin Const. Co.* v. *United States*, 345 F. 2d 610, 613-14 (3d Cir. 1965); *Schneider* v. *McKesson & Robbins, Inc.*, 254 F. 2d 827, 831 (2d Cir. 1958).

With respect to the occurrence at its store, Kress does not deny that petitioner was refused service; it has, however, repeatedly denied that such refusal was "conspiratorial" or was based upon race, color or creed. In fact,

---

* Petitioner now seems to rely upon the mere sequence of events. In this connection petitioner points to the fact that a policeman entered Kress while she was present. However, as petitioner knows,

(footnote continued on next page)

Kress was a leader in civil rights in the South, with an express policy against racial discrimination (R. 760-761). The company had made certain that its facilities were available to all, and it was for just this reason that petitioner and the students came to Kress (R. 68). The proof was clear that Kress had served mixed groups in its Hattiesburg store prior to August 14 and that the decision not to serve petitioner was unilateral, triggered solely by the fear of the store manager for the safety of petitioner, her companions and the customers in the store at the time (R. 749, 755).

Petitioner failed to come forward with even a fragment of proof to show a conspiracy between Kress and anyone. The lower Courts properly refused to permit petitioner's vague unsupported allegations to serve as a substitute for the hard facts which Kress assembled, particularly since petitioner admitted that she had absolutely no knowledge of any communications between Kress and the police of Hattiesburg (R. 735).

Where, as here, there is no evidence which could properly go to the jury, and since the court would have been required to direct a verdict in respondent's favor at the end of petitioner's case if there were a trial, summary judgment was proper. *Morgan* v. *Sylvester*, 125 F. Supp.

(footnote continued from previous page)

this is a slender reed upon which to rely. Petitioner's sworn testimony states that, from the moment she left the library, the police followed her (R. 728-729). Further, even according to the testimony of petitioner's own witnesses (which petitioner never tendered on the summary judgment motion), the policeman did nothing but look at the group, walk to the back of the store and leave (R. 158-159). Contrary to petitioner's unsupported statement that the policeman "communicated" with a Kress employee, the record is clear that no such thing ever happened. Since the proof is that Kress did not know of the events at the library or call the police, to fabricate a case upon the entry of a police officer into the Kress store is fantastic.

380 (S. D. N. Y. 1954), *aff'd*, 220 F. 2d 758 (2d Cir.), *cert. denied*, 350 U. S. 867 (1955).

Reference to the *Achtenberg* case, *supra*, is simply a bootstrap attempt to insert a factual issue where none exists. The most cursory reading of that opinion, which was before the Second Circuit when it reached its decision, reveals that the vagrancy arrests there were unrelated to Kress. All that the Fifth Circuit found in *Achtenberg* was that the arrests there were a sham. There was no proof, and no finding, that Kress was in any way connected with the arrests. Indeed, it was not an issue in *Achtenberg*. In the instant case, however, where this was at issue, both Courts below found that plaintiff had utterly failed to offer the slightest proof of any participation by Kress in a conspiracy. Whatever claim petitioner might have against the police, she certainly has none against Kress. Thus, the District Court was correct when it found

> "no evidence in the complaint or in the affidavits or other papers from which a 'reasonably-minded person' might draw an inference of conspiracy. . . .
>
> ". . . The plaintiff may not defeat defendant's motion for summary judgment on the mere hope that she will be able to discredit these denials by cross-examination at trial." (App. B-7)

In unanimously affirming this holding, the Court of Appeals was even more blunt:

> "Plaintiff's claim was wholly conclusory; she alleged no facts that would tend to suggest a conspiracy; and the chances of her proving such a conspiracy at the trial were nil." (App. B-23)

Under all these circumstances, it would have been an abuse of discretion for the Courts below to reach any

decision other than that summary judgment was proper. See, *e. g., First Nat. Bank* v. *Cities Service Co.*, 391 U. S. 253 (1968).

II

The Civil Rights Act of 1875 Is Inapplicable to This Action

After this action was almost a year and a half old, petitioner attempted to amend her complaint to allege a cause of action under the Civil Rights Act of 1875, Ch. 114, 18 Stat. 335, which, by its terms, guaranteed

> "full and equal enjoyment of the accommodations, advantages, facilities and privileges of *inns, public conveyances on land or water, theatres and other places of public amusement. . . .*" (Emphasis supplied.)

This statute was declared unconstitutional by this Court in the *Civil Rights Cases*, 109 U. S. 3 (1883), and while it has never been repealed by Congress, it does not appear in the United States Code.

The genesis of the proposed revival of this unconstitutional statute, which petitioner has sought to adopt, is the law review article, Nimmer, "A Proposal for Judicial Validation of a Previously Unconstitutional Law: The Civil Rights Act of 1875," 65 Col. L. Rev. 1394 (1965). The flaw in such an adoption by petitioner, irrespective of the validity of the doctrine, is simply that the statute is not relevant to the facts here. Indeed, as Nimmer, the author of the doctrine, pointed out, the statute clearly would not apply to lunch counters. The District Court aptly noted this when it said

> "However, not even the broadest interpretation of 'inns' as used in the 1875 Act could encompass the

> defendant's lunch counter. See, Nimmer, 'Judicial Validation', *supra*, at pp. 1396-1397 and cases cited. For this reason, it is unnecessary to decide whether Sections 1 and 2 have been or can be revived, and plaintiff's motion to amend her complaint to add a cause of action thereunder is denied." * (App. B-8)

Under the facts of this case, any supposed question raised by the Nimmer proposal is purely theoretical.

III

The District Court Was Correct in Holding That Petitioner Did Not Meet the State Action Requirement of 42 U. S. C. §1983

The basic requirement for liability under 42 U. S. C. §1983 is that the party act "under color of any statute, ordinance, regulation, custom, or usage" of the State. Nor is this surprising, for this Reconstruction Era statute, finding its genesis in the Fourteenth Amendment, was aimed at the deprivation of civil rights by state governments, and was not intended to apply to private acts by private citizens. *Civil Rights Cases*, 109 U. S. 3 (1883). Indeed, it was this gap in application to individuals which led Congress to pass the Civil Rights Act of 1964, 78 Stat. 241, 42 U. S. C. §2000 *et seq. Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241 (1964).

Petitioner, however, has chosen not to sue under the 1964 Civil Rights Act to seek injunctive relief against any alleged wrong, but rather has sought more than half a million dollars in damages. The only statute which can afford a basis for such a monetary claim is Section 1983 with its state action requirement. The 1964 Act does not

---

* The last sentence quoted from the opinion was inexplicably omitted from petitioner's Appendix.

require state action for liability, but it does not provide for damages, either. *Katzenbach* v. *McClung,* 379 U. S. 294 (1964). Petitioner cannot extrapolate from both statutes to avoid satisfying the requirements of either one. Having chosen to sue under Section 1983, petitioner must meet the standards of that Section and prove the existence of state action.

To establish state action under 42 U. S. C. §1983, petitioner must show that there has been significant state involvement in the alleged private discrimination. *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 722 (1961). The crucial test is whether state power "has in fact been exercised." *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 265 (1964).

Petitioner has attempted to rely upon three Mississippi statutes and a legislative resolution to support her claim of state action here. Two of these statutes and the resolution have nothing to do with the instant situation.* The

---

*The Senate Concurrent Resolution No. 125 enacted in 1956 is merely a condemnation of this Court's decision in Brown v. Board of Education, 347 U. S. 483 (1954). Section 4065.3 of the Mississippi Code purports to require the executive branch of the state government to prohibit the mixing of races by the Federal Government in certain public places, not including restaurants or stores such as Kress. Mississippi Code Section 2056(7) is likewise inapposite. This 1954 statute is a broad conspiracy statute which, *inter alia,* makes it a crime to conspire to overthrow or violate the segregation laws of the state. Since there was no allegation in the first cause of action of the complaint that Kress conspired with anyone else, the reference to this statute would only be encompassed in the second, or conspiracy claim. Moreover, there are no laws covering segregation in restaurants which could be conspired against.

It is clear that, on their face, the above enactments have nothing to do with the instant case and cannot ground a claim of state action in a suit concerning a refusal of service by a restaurant in 1964.

third statute, Mississippi Code Section 2046.5, reiterates the old common law rule that a restaurant owner who does not offer lodging, may choose such customers as he pleases and enforce his decision, if necessary, by resort to proper law enforcement officials. *Cf. Williams* v. *Howard Johnson's Inc.*, 323 F. 2d 102 (4th Cir. 1963); *Alpaugh* v. *Wolverton*, 184 Va. 943, 36 S. E. 2d 906 (1946); *Nance* v. *Mayflower Tavern, Inc.*, 106 Utah 517, 150 P. 2d 773 (1944).

At common law, a restaurant owner, unlike an innkeeper, was free to select patrons on any basis deemed satisfactory to him. 21 Halsbury's, *Laws of England*, §941, p. 447 (3d ed.). However, a person who held himself out as one who would aid travelers and offer them lodging did not have that right, for

> ". . . if an innkeeper, or other victualler, *hangs out a sign and opens his house for travelers*, it is an implied engagement to entertain all persons who travel that way. . . ." 3 Blackstone, *Commentaries* 164 (Lewis ed. 1902) at 166. (Emphasis added.)

Thus, a victualler, who does not furnish lodging, such as a restaurant owner (Tidswell, *The Innkeeper's Legal Guide*, p. 22 (1864)), is entirely distinct from an innkeeper, who by furnishing accommodations takes on a heavy duty. *Orchard* v. *Bush & Co.*, [1898] 2 Q. B. 284; *Thompson* v. *Lacy*, 3 B. & Ald. 283 (K. B. 1820). This proposition was well stated in *R.* v. *Rymer*, [1877] 2 Q. B. 136 at 139, 140, where the court held that

> "The defendant was the proprietor of an hotel, and if the prosecutor had been refused accommodation in the hotel the case might have been different. But he was not. The place in question, known as the Carlton, was under the same roof as the hotel, but was entirely separate from it, with a separate en-

> trance, and appears to have been a mere shop in which spirits are retailed across the counter. . . . Such a place is not an inn within the meaning of the common-law rule. An inn is a place 'instituted for passengers and wayfaring men:' *Calye's Case.* A tavern is not within the definition. In such a place as this no one has a right to insist on being served any more than in any other shop."

See also, *Carpenter* v. *Taylor,* 1 Hilt. [N. Y.] 193, 195 (1856); *Ultzen* v. *Nicols* [1894] 1 Q. B. 92; Beale, *Innkeepers and Hotels,* §35, p. 26 (1906). There being no statutory provisions to the contrary, these common law rules are in effect in Mississippi. *City of Jackson* v. *Wallace,* 189 Miss. 252, 196 So. 223, 225 (1940); *Western Union Telegraph Co.* v. *Goodman,* 166 Miss. 782, 146 So. 128 (1933).

Where there is no positive provision of state law requiring or encouraging segregation of eating facilities, and the only state statute on the subject merely restates a common law right, there can be no state action upon which to base a monetary claim against Kress under Section 1983. *Williams* v. *Howard Johnson's Inc.,* 323 F. 2d 102 (4th Cir. 1963); *Harrison* v. *Murphy,* 205 F. Supp. 449, 453 (D. Del. 1962).

Nor, as the Court of Appeals held, can petitioner rely upon *Reitman* v. *Mulkey,* 387 U. S. 369 (1967) to support her arguments. The decisions of the Courts below in the instant case are completely consistent with the doctrine set forth in *Reitman,* where this Court upheld the California Supreme Court's decision that Article I, §26 of the California Constitution involved the state in racial discrimination in housing in violation of the Equal Protection Clause of the Fourteenth Amendment. In the *Reitman* case, this Court noted that California had affirmatively acted to change its existing anti-discrimination housing

laws in a much-publicized, statewide initiative and referendum. This, of course, is entirely different from the present case where the section in question is merely a restatement of common law, which, in fact, had absolutely no bearing on Kress' conduct. Moreover, Art. I, §26 had become part of the California Constitution, which placed it on quite a different level than a mere statutory enactment. This was crucial, for

> "[t]he right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from all censure or interference of any kind from official sources." 387 U. S. at 377.

Finally, this Court, relying heavily upon the California Supreme Court, was very careful to point out in *Reitman* that it did not "rule that a State may never put in statutory form an existing policy of neutrality with respect to private discriminations", such as the Mississippi statute. 387 U. S. at 376. Even under the broad concepts of state action as set forth in *Reitman*, it cannot be said that Section 2046.5 has significantly involved the state in Kress' private, allegedly discriminatory acts. The Section is innocuous on its face and has never been enforced.

In a final attempt to conjure up state action, petitioner argues that there was a custom and usage in Hattiesburg, Mississippi of refusing service to white persons in the company of Negroes. Petitioner failed totally to introduce any evidence of a relevant custom and usage in Hattiesburg. All that was required was competent testimony of specific instances taking place in Hattiesburg prior to

August 14, 1964, from witnesses with personal knowledge of the alleged occurrences. *Cf. Parkway Baking Co.* v. *Freihofer Baking Co.*, 255 F. 2d 641, 647 (3d Cir. 1958); *Hunter-Wilson Distilling Co.* v. *Foust Distilling Co.*, 84 F. Supp. 996, 1003 (M. D. Pa. 1949); see also *Ames Mercantile Co.* v. *Kimball S. S. Co.*, 125 Fed. 332 (N. D. Cal. 1903).

Petitioner testified at trial that she had never been in the state of Mississippi prior to June, 1964 and had never visited Hattiesburg until July of that year (R. 63). She was compelled to admit that she had no personal knowledge of any facts which would support the existence of the claimed custom (R. 68). Petitioner's only other witnesses, all life-long residents of Hattiesburg, testified that they knew of no instance in which a white person had been refused service in that city while in the company of Negroes who were served (R. 106, 120, 134). With this total absence of evidence, the District Judge had no choice but to grant a directed verdict, since there was nothing which could properly be submitted to the jury. *Cf. Gordon* v. *Illinois Bell Telephone Co.*, 330 F. 2d 103 (7th Cir.), *cert. denied*, 379 U. S. 909 (1964).

It does not help petitioner to argue that there was a custom in Mississippi generally of "fostering the segregation of races" (App. C-4). Even if there were such a custom it would have no bearing on Kress or upon this case, for Kress had only one set of eating facilities in its store at which it served all customers (R. 1042). There is not, and cannot be, any claim that Kress ever segregated the races in its Hattiesburg store (R. 104, 117, 131). To reach back to 1880 to try to paint Kress with the broad brush of Mississippi history is, in light of the facts, not only irrelevant to this case but unwarranted as well. Kress cannot and should not, in good conscience, be branded in this manner.

The proof in the record establishes that Kress was not aware of, and did not act pursuant to, any custom or usage

(R. 723, 758, 1035) but rather for good cause to avoid serious violence at the moment (R. 753, 758). Kress served both Negroes and whites, whether they came in together or separately, both before and after August 14th and indeed on that very same day (R. 750-751, 756, 758). Kress had, and still has, a firm written policy prohibiting any discrimination in its stores based upon race, color or creed (R. 759-760). Because violence was averted on August 14th, the Hattiesburg store has remained open and has continued to serve all people, black and white together, at its facilities, without incident (R. 751, 758).

Thus it is clear that this case involves only one isolated incident, totally unrelated to any claimed custom, usage or statute of the State. The case arose out of the most unusual circumstances, which never occurred before or after that day. Since petitioner was unable to show any state action, she clearly failed to make out a *prima facie* case under 42 U. S. C. §1983.

IV

The District Court Correctly Excluded Two Surprise Witnesses First Designated at Trial

On December 9, 1965, pursuant to Rule 13 of the Calendar Rules of the United States District Court for the Southern District of New York, that Court ordered the parties to exchange lists of witnesses and to file pre-trial memoranda setting forth "a list of witnesses which each party intends to call along with the specialties of experts to be called" (R. 772). Petitioner listed, in addition to herself, only the six students.

The parties thereafter agreed to a pre-trial order of the District Court which provided that the only witnesses at trial would be those previously designated, and

> "[s]hould any party hereafter decide to call any additional witnesses, *prompt* notice . . . shall be

> given. . . . It shall set forth the reason why the witness was not theretofore identified. No witness may be called at trial unless identified in a pre-trial memorandum." (Emphasis the Court's) (R. 1047)

A similar requirement was set forth in the pre-trial order with respect to any expert witnesses.

Despite the fact that a pre-trial conference was held before the trial judge two weeks prior to trial, at which time petitioner's counsel made no mention of new witnesses, on the day before trial, petitioner served a paper entitled "Amendment to Trial Memorandum" advising respondent, for the first time, of her intention to call an expert witness. In her trial memorandum, served the same day, petitioner merely mentioned, in passing, proposed testimony of a second witness whose name had never before appeared in the case. In neither instance did petitioner "set forth the reason why the witness was not theretofore identified" as required by the District Court.

When respondent's counsel objected to the calling of these surprise witnesses, it became clear that despite the fact that the issues to be tried had been agreed to almost a year earlier, petitioner's counsel had made no effort to secure these witnesses until the week before the trial (R. 7-8) and did not, even at that late date, inform respondent of the fact of the additional witnesses, much less their names. The problem was further complicated by the fact that petitioner's counsel confessed she had not met the proposed witnesses and did not really know what their testimony would be (R. 5, 13-14).

Petitioner's excuse here is identical with that offered in *Thompson* v. *Calmar S. S. Corp.*, 331 F. 2d 657, 662 (3d Cir.), *cert. denied*, 379 U. S. 913 (1964) where the court ruled that

> "The only excuse offered by the defendant is that it was uncertain that the witness would be available

> at the time of trial. In these circumstances it would be wholly contrary to the spirit of our Rules and destructive to orderly procedure to permit him to testify."

The effect of such a tactic in this case would have been to strip Kress' counsel of an opportunity to prepare for cross-examination. The courts will not tolerate such a result. *Clark* v. *Pennsylvania R. R.*, 328 F. 2d 591, 594-595 (2d Cir. 1964); *Hoeppner Const. Co.* v. *United States*, 287 F. 2d 108 (10th Cir. 1960); *Globe Cereal Mills* v. *Scrivener*, 240 F. 2d 330 (10th Cir. 1956).

The vacuity of petitioner's argument is demonstrated by the fact that her counsel advised the court that a postponement of the case would not help because "on the date the case could be put over I could well not have had" the witness (R. 14).

Further, petitioner admitted in her brief below that while the two excluded witnesses would have testified with respect to custom and usage in Mississippi in 1964, the exclusion of these witnesses was not "pivotal since evidence was adduced through plaintiff as to the custom and usage in Hattiesburg." Obviously where, as here, the testimony of the witnesses would have been cumulative and of no probative value, it is within the sound discretion of the trial court as to whether it should be admitted. *Mahoney* v. *N. Y. Cent. R. R.*, 234 F. 2d 923 (2d Cir. 1956); *Jahn* v. *Pedrick*, 229 F. 2d 71 (2d Cir. 1956).

The facts here demonstrate that not only was it a proper exercise of discretion to exclude the witnesses pursuant to Rule 16(a-b) of the Calendar Rules of the United States District Court for the Southern District of New York, but, indeed, it would have been an obvious abuse of discretion and prejudicial to respondent to do otherwise. *Cf. Thompson* v. *Calmar S. S. Corp., supra; Taggart* v. *Vermont Transp. Co.*, 32 F.R.D. 587 (E. D. Pa. 1963), *aff'd per curiam*, 325 F. 2d 1022 (3d Cir. 1964).

Conclusion

The Petition raises no issues of substance or importance, but rather only questions based upon a unique fact situation involving the interests of one particular litigant. Under these circumstances, this Court has traditionally declined to exercise its discretionary jurisdiction. *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, 74 (1955); *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393 (1923).

Petitioner having failed to set forth any basis for review by this Court, the Petition for Writ of Certiorari should be denied.

April 22, 1969

Respectfully submitted,

SANFORD M. LITVACK,
Attorney for Respondent,
S. H. Kress and Company.

JAMES R. WITHROW, JR.,
ALFRED H. HODDINOTT, JR.,
ROBERT L. SIMPSON, JR.,
DONOVAN LEISURE NEWTON & IRVINE,
Of Counsel